

DATE: AUGUST 29, 1995

CASE NO: 93-INA-519

In the Matter of

CALL BUSINESS SYSTEMS, INC.
Employer

on behalf of

AHMAD CHEIKHALI
Alien

Before: Clarke, Jarvis and Williams
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review pursuant to 20 C.F.R. §656.26(1991) of the United States Department of Labor Certifying Officer's ("C.O.") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to §212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. §1182(a)(14)(1990)("Act"). The certification of aliens for permanent employment is governed by §212(a)(5)(A) of the Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.) Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the C.O. denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

The Employer, Call Business Systems, Inc., filed an application for labor certification for the position of Computer Programmer on November 9, 1992 (AF 1-67). The requirements for the position were a Bachelor's Degree in Computer Science or Business Information Systems, with one year and 6 months experience in computer programming, which experience must include PROGRESS programming with VARNET package (AF 84). The latter was listed as a "special requirement" by the Employer (AF 84).

The C.O., in a Notice of Findings ("NOF"), dated May 24, 1993, proposed to deny the application on grounds that the Employer wrongly rejected U.S. workers for a position in favor of the Alien (AF 68-71). The C.O. advised that the Employer could rebut the finding by recontacting the U.S. applicants via certified mail, arranging for interviews, and giving serious consideration to the U.S. workers (AF 70). Employer was also required to document the results of the job search, submitting specific documentation of the lawful, job-related reasons for any applicant's rejection (AF 70). The Employer submitted its rebuttal on June 22, 1993, stating that its initial, written contact with the U.S. applicants was sufficient under the regulations, and the C.O.'s requirement that they be recontacted would be a futile exercise (AF 71-75). Employer posits that no applicants responded to the initial contact because they were unqualified for the position, and reiterated that its job requirements were firm (AF 71-75).

The C.O. denied labor certification in her Final Determination dated June 29, 1993. (AF 76-77). The Employer filed a timely request for review to this Board on July 29, 1993 (AF 70-85).

DISCUSSION

The C.O.'s denial of certification was based solely upon her determination that the Employer had unlawfully rejected U.S. workers who sought the position during the recruitment phase of the labor certification process.

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. Section 656.21(b)(6). Although the regulations do not contain an explicit "good faith" provision concerning post-filing recruitment, one is implied. H.C. LaMarche Ent, Inc., 87-INA-607 (Oct. 27, 1988). Where an applicant's resume shows a broad range of experience, education and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, the employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Graphic Design, 89-INA-118 (Nov. 29, 1990)(en banc).

Eight U.S. applicants for the position were deemed by the C.O. to have been unlawfully rejected (AF 69). Applicant Larisa Boyko's resume indicates a BS in Applied Mathematics and Computer Technology, as well as 9 years experience in computer programming and experience with several programming languages and systems (AF 24). Applicant David Humeniuk's resume lists a BS degree in Electrical Engineering, 3 years professional experience, and knowledge of several computer systems and languages (AF 27). Applicant Michael Guymon's resume shows a BS in Applied Physics with a computer science specialization and knowledge of several computer languages and operating systems (AF 29). Applicant Michel Shaker's resume lists a BS in Mechanical Engineering, 2 years experience as a systems engineer, and familiarity with many software and operating systems (AF 31-32). Applicant John M. Nuccetelli's resume indicates a BS in Computer Science, 2 years computer experience, and knowledge of several languages and systems (AF 34). Applicant James Boe's resume shows a Master's degree in Computer Science, 4 years professional experience, and proficiency in various languages and systems (AF 36). Applicant Timothy Cook's resume lists a BS in Computer Science, several years computer experience, and knowledge of different languages and systems (AF 39). Finally, Applicant David Allen's resume indicates 9 years experience as a computer programmer, college and vocational school education, and knowledge of different languages and systems, including PROGRESS and VARNET (AF 42). Despite the diversity in the qualifications of the 8 U.S. applicants, Employer's written response regarding each was exactly the same, changing only the pronoun he or she to accurately reflect gender (AF 65-67). The Employer was "not clear that [each applicant] met the minimum requirements for the position", and each applicant was "rejected for being either unable, unwilling, or unavailable to perform the duties of the job" (AF 65-67).

Employer's actions with regard to the 8 U.S. workers rose to the level of a summary rejection of the group as a whole. Each applicant was sent the same form letter requesting clarification of requirements, despite the differences in each applicants'

education and experience (AF 25, 28, 30, 33, 35, 37, 40, 43). Each form letter contained the sentence "From a review of your resume', it does not appear that you meet these requirements", with no explanation of exactly which requirement each applicant had been deemed not to have met. Id. Curative instructions include a requirement to forward copies of diplomas and transcripts within 10 days of the date of the letter. Id. The letter also required each applicant to "confirm whether or not you meet the [additional non-education] requirements". Id.

Reviewing the resumes of each of the 8 U.S. workers the C.O. deemed to have been unlawfully rejected, we find that each applicant possessed qualifications which had been specifically required by the Employer. Each resume was silent on some requirements. In the case of Mr. Allen, although his resume indicated that he did not possess a Bachelor's degree, it did show substantial work experience in the specific language and operating systems used by the Employer.

Each of these 8 U.S. workers' resumes raise the possibility that they may have been qualified for the job, and should have been offered an interview. Microbilt Corp., 87-INA-635 (Jan. 12, 1988); McCluskey's Steak House, 92-INA-396 (Jan. 4, 1994). Employer stated that it does not normally use letters to follow up on resumes, but it does not normally conduct a nationwide recruitment (AF 72)(emphasis in original). We note that 4 of the U.S. workers reside in the same city as the Employer's place of business, 2 others live in the same state, 1 lives in a neighboring state, and only 1 U.S. worker resides outside the geographic area. Under the mandate of implied good faith, the Employer's normal business practices of conducting an interview to explore an applicant's qualifications should have been followed, rather than the inquiry by mail. H.C.LaMarche Ent, Inc., 87-INA-607 (Oct. 27, 1988). A telephone interview could have been offered as a reasonable accommodation to the sole applicant outside the employer's geographic area. Lin and Associates, Inc. 88-INA-340 (May 31, 1989)(en banc).

Employer states that each of the 8 U.S. workers was "either unable, unwilling, or unavailable to perform the duties of the job" because they did not respond to the Employer's letter. (AF 65-67). We note that the letters required the applicants to forward copies of diplomas, transcripts and confirmation of other requirements within 10 days of the date of the Employer's letter (AF 25, 28, 30, 33, 35, 37, 40, 43). No accommodation was made for the time involved in mailing either the inquiry or the response. No accommodation was made for the applicant to obtain copies of necessary documentation they might not possess. Finally, the requirement that the applicants "confirm" their non-educational qualifications is vague and confusing.

Employer's contact of the 8 U.S. workers did not comport with the good faith requirement of post-filing recruitment.

ORDER

The denial of labor certification is hereby AFFIRMED.

Entered this ____ day of _____, 1995, for the Panel:

DONALD B. JARVIS
Administrative Law Judge

I dissent:

The CO did not hold that the Employer's requirements, including the experience with Varnet and the BS degree, were unduly restrictive. The 8 applicants were quite specific as to the language/systems they had experience with and the only one with Varnet experience does not have a BS degree. Adry Mart, Inc. 88-INA-243. As the resumes did not raise a reasonable probability or possibility that the applicants were qualified (i.e. there were no unanswered questions regarding nature of experience or education), Employer was not obligated to interview. Letters to applicants were, in effect, letters of rejection for the position with the option of permitting correction of the resumes.

JOEL WILLIAMS
Administrative Law Judge